No. 11984
No. 11985

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11984

WILLIAM LESLIE KOHL, *Appellant*,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation, *Appellees.*

No. 11985

ARTHUR J. SESSING, *Appellant*,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

MISCELLANEOUS

CONSTITUTION

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LESLIE KOHL, *Appellant*, vs. S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY INC., a corporation, *Appellees*.	No. 11984
ARTHUR J. SESSING *Appellant*, vs. S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY INC., a corporation, *Appellees*.	No. 11985

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BRIEF OF APPELLANTS

JURISDICTION

These cases were appealed to this court by the defendants in August, 1946, and were assigned docket numbers 11464 and 11465. A complete statement of the jurisdiction of the District Court and this court is set forth at pages 1-4 of the opening brief of defend-

ants-appellants in those appeals. These appeals were argued before this court May 15, 1947. On September 15, 1947, this court entered its order remanding these cases to the District Court upon the following terms:

> "Upon motion of appellants in the above entitled cases all of the said cases are hereby remanded to the trial courts whence they came with instructions that appropriate and proper proceedings be permitted in the referred to court whereby appellants may proffer pleadings to the effect that all defenses permitted by sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue. We herewith make no decision or intimation as to the merits of the proffer."

This order was amended *nunc pro tunc* October 13, 1947, to relate to §11 instead of §10 of the Portal-to-Portal Act of 1947.

On October 31, 1947, the District Court entered its order reopening the cases for trial upon the issues specified in the order of this court remanding the cases, and permitting the defendants to file amendments to their answer and affirmative defenses (R. 8-10). The defendants accordingly served upon the plaintiffs a supplemental answer and affirmative defenses, November 5, 1947 (R. 11-12).

Trial upon defendants' supplemental answer and affirmative defenses was commenced December 8, 1947 (R. 77). March 2, 1948, the trial court entered judgment vacating its prior judgment of May 28, 1946, and giving judgment for the defendants and against the plaintiffs (R. 20-21). From this judgment the plaintiffs have now appealed to this court (R. 22).

In the interest of economy to all parties, it was stipulated between appellants and appellees that, as to all matters occurring in these cases prior to the order of this court quoted above, the records on appeal in causes numbered 11464 and 11465 should be and constitute part of the record on these appeals (R. 32).

The appellants, therefore, adopt *in toto* the statement of jurisdiction set forth in the opening brief of defendants-appellants in appeals number 11464 and 11465 at pages 1-4.

The only statute, the validity of which is involved in this appeal is the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §§251-262). The only sections of this statute which will be considered or which are pertinent to these appeals are §§9 and 11 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §§258 and 260). These sections read as follows:

> "§258. Reliance on past administrative, rulings, etc.
>
> "In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or

enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

"§260. Liquidated damages.

"In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title."

STATEMENT OF THE CASE

These cases are suits by the appellants to recover from the appellees unpaid overtime compensation due under the Fair Labor Standards Act, as amended, (Title 29, U.S.C.A. §§201-219). The facts which appellants maintain entitle them to such recovery are fully set forth in their brief in appeals numbered 11464 and 11465 wherein they appear as appellees. On the question of whether or not the appellants are entitled to the protection of the Fair Labor Standards Act, as amended (Title 29, U.S.C.A. §§201-219), the appellants adopt in full the additional statement of the case set forth at pages 1-5 of their brief in appeals numbered 11464 and 11465, in which they appear as appellees.

This brief will concern itself solely with the questions of whether or not appellants' suits are barred under §9 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §258) and whether or not the appellees are relieved from payment of liquidated damages by §11 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §260).

These cases were consolidated for trial with *Lassiter v. Guy F. Atkinson Co.* and others, all of which cases are now on appeal to this court. Before the trial on the supplemental answers and affirmative defenses it was recognized that the evidence offered by all defendants would be identical. Therefore, in the interest of economy and time, it was stipulated by and between all parties to all consolidated cases, that all documentary exhibits introduced on behalf of or against one defendant should apply equally to all defendants

and the knowledge imputed to one defendant should be deemed the knowledge of all defendants (R. 11983, 41). This stipulation was incorporated in a pre-trial order (R. 75).

Pursuant to this stipulation and pre-trial order, the documents from the files of the Guy F. Atkinson Co. were photostated and used as the evidence in all consolidated cases.

On January 9, 1943, by order of the Chief of Engineers of the War Department, Lt. Col. C. D. Barker, Chief, Labor Relations Branch, Construction Division, issued Circular Letter No. 2236 (Exhibit 14) relating to the policy of the Construction Division for non-manual employees on fixed-fee construction contracts, and providing that Group "B" employees, the group to which both these appellants belonged, would be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. The minimum work-week was 48 hours.

The pertinent portions of this circular letter are set forth in Appendix A. of this brief.

June 28, 1943, Major C. C. Templeton, Corps of Engineers, Chief, Personnel Branch, addressed a letter to the appellees, (Exhibit 21, R. 281-283) informing them that problems concerning the applicability of laws affecting the labor costs of the contractor frequently arise, and that since the War Department is responsible for the reimbursement of proper labor costs under these contracts, such problems should be submitted through the contracting officer. Such pro-

cedure should govern problems under the Fair Labor Standards Act. The letter assures the appellees that if a ruling is required from a civilian agency, it will be obtained by or through the War Department, and advises the appellees that requests for such rulings should be made through the contracting officer. The full text of this letter is printed as Appendix B to this brief.

On December 31, 1943, the appellees entered into the contract with the War Department which is refered to throughout these proceedings as the prime contract. This prime contract is in evidence in appeals numbered 11464 and 11465 as Defendants' Exhibit A-1, and is identical in form and substance with Defendants' Exhibit 13 in this appeal. This contract was what is known as a "cost-plus-a-fixed-fee contract" and provided, among other things:

> "Article I. *Statement of work*
>
> "3. * * * In consideration of the undertaking of this contract, the contractor shall receive the following:
>
> "*a.* Reimbursement for expenditures as provided in Article II."

Article II of the contract pertaining to cost of work included the following provisions:

> "1. *Reimbursement for Contractor's Expenditures.*
>
> "The contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work *as may be approved or ratified by the contracting officer,* and as are included in the following items:

"*a.* All *labor*, materials, returnable containers and reels, tools, machinery, equipment, supplies, services, utilities, power and fuel necessary for either temporary or permanent use for the benefit of the work.

* * * * * * * * * * * *

"*h.* Salaries of job managers, resident engineers, superintendents, timekeepers, foremen and other field employees of the contractor in connection with the work * * * No person shall be assigned to service by the contractor as superintendent of construction, chief engineer, chief purchasing agent, chief accountant or similar position in the contractors' field organization or as principal assistant to any such person until there has been submitted to and approved by the contracting officer a statement of the qualifications, experience, and salary of the person proposed for such assignment. The payment of any excess salary over such scheduled amounts shown in the approved salary schedule, Appendix C, attached hereto and made a part hereof *shall not be reimbursable* unless and until the contracting officer has so approved in writing." (Emphasis supplied)

Specifically referring to the subject of labor Article X of the Prime Contract contained the following pertinent provisions:

"1. Rate of Wages:

* * *

"(d) Conditions of employment, rates of pay for overtime and holidays will be as set forth in the employment agreements attached hereto and made a part hereof. Appendices D and *E*.

"(e) It is contemplated that work at the site

> will be carried out on the basis of two 10-hour shifts a day seven days a week." (Emphasis supplied)

Referring to Appendix E attached to the Prime Contract we find that this Appendix prescribes the Contractors Uniform Contract of Employment for non-manual employees and includes the following provision:

> "Article VIII *d.* Group 'B' Employees will be expected to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than the base compensation. * * *"

Thus the terms of Circular Letter No. 2236 (Exhibit 14) were duly incorporated in the Prime Contract (Exhibit 13).

The appellees at all times followed and complied with the terms of the Prime Contract, (Exhibit 13) (R. 275, 478).

The appellees never accepted the offer of the War Department extended through exhibit 21, quoted above, by requesting the War Department to procure a ruling from the Wage and Hour Division as to whether or not the Fair Labor Standards Act applied to their employees. The appellees never requested a ruling at all (R. 283, 427, 475-476) and none was ever sought on their behalf (R. 430-431).

In response to a question from the court as to what the appellees did to keep from violating the Fair Labor Standards Act, the appellees' witness, Northcutt, testified that prior to the execution of these contracts they had consulted their attorneys and the

national office of the Contractors' Association and were advised that original construction work was not covered by the act (R. 141-142).

On March 21, 1944, an Interdepartmental Agreement was published in the Federal Register as War Department Procurement Regulation 11, and as a preface recites:

> "* * * (1) In order that any differences of opinion between the War or Navy Departments and the Department of Labor as to the legal position which should be taken by the Government in suits against cost-plus-a-fixed-fee contractors based upon the Fair Labor Standards Act may, be resolved, the War Department, the Navy Department, The Department of Labor and the Department of Justice have entered into the following agreement as to the administrative procedures to be followed to determine the position to be taken by the Government in such suits:" (p. 2992)

The agreement then goes on to describe the procedure of investigating, determining and processing claims under the Act made against cost-plus-a-fixed-fee contractors (Exhibit 81).

On the same day, there was published in 9 Federal Register, at page 2989, as Procurement Regulation 9, a resume of the provisions of the Fair Labor Standards Act with respect to minimum wages and maximum hours and overtime compensation, specifically as applied to cost-plus-a-fixed-fee contractors, providing for the reimbursement of overtime payments required by the Act as labor costs, reimbursement of amounts paid in settlement of claims under the Act

and providing for cooperation with the Wage and Hour Division when the latter agency might choose to investigate a contractor with respect to his compliance with the Act (Exhibit 81).

The appellees had actual as well as constructive knowledge of the contents of these Procurement Regulations (R. 354-355) and were aware of the dispute between the War Department and the Wages and Hours Division concerning the coverage of the Fair Labor Standards Act (R. 288).

Under date of April 13, 1944, Major George F. Tait, Corps of Engineers, Contracting Officer, replied to an earlier inquiry from one appellee in a letter marked Exhibit 75. The pertinent paragraphs of this letter read:

> "In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standards Act. Many highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hours per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six days of the week.
>
> "Circular letter No. 2390 is a result of this continuous argument about the application of the Fair Labor Standards Act. The wage and hour people claimed that it did apply and no authoritative answer could be obtained, so the legal staff

> of the Chief of Engineers effected a compromise acceptable to the wage and hour people. This provided pay for the lower bracket employees in conformity with the provisions of the Act, but did not accept the application of the Act over all, as demonstrated by the straight time overtime provisions of Grade B employees. The only explanation of this is that it was a compromise agreement that such employees were semi-supervisory. The Act exempts supervisory employees but nothing is said about semi-supervisory employees, so the debate is still unsettled. The compromise did obtain the assurance that the wage and hour people would not press claims under the Act because of failure to pay time and a half overtime for the B group."

The promulgation of Executive Order 9250 froze the wages and salaries paid by the appellees at the base obtaining on October 3, 1942. Since manual employees received overtime payments in accordance with Executive Order 9240, and, under the terms of the Prime Contract, (Exhibit 13), non-manual employees received no overtime except for the seventh day, the gross earnings of the manual employees exceeded the gross earnings of the non-manual employees, causing considerable dissatisfaction in the latter group (R. 116).

In order to meet this situation the appellees held conferences with representatives of the War Department and in Exhibits 22 and 26 requested approval of a new or revised salary structure (R. 122). The gist of the request was to establish a base pay for Group C and B non-manual employees that would

result in gross earnings to these employees greater in amount than the gross earnings of their subordinates (R. 127). The War Department replied to these requests by referring the appellees to the Treasury Department and the War Labor Board for approval of these salary and wage increases (Exhibits 25 and 27, R. 128).

The inequities in gross earnings between manual and non-manual employees made it difficult for the appellees to obtain qualified non-manual workers (R. 290-291, 416-417) yet, if the appellees increased or adjusted the base pay of non-manual employees without approval of the Treasury Department or the War Labor Board, the salaries and wages so paid *would not have been reimbursible* under the Prime Contract, Exhibit 13 (Exhibit 25, R. 238-239, 240-241, 418).

The appellees held numerous conferences with representatives of the War Department, the War Labor Board and the Treasury Department on this problem (R. 129), and finally the War Department verbally asked the appellee, Guy F. Atkinson Co., to make a uniform submission on behalf of all the appellees (R. 131). During all these conferences no reference whatever was made to the Fair Labor Standards Act (R. 237). In order to make the joint submission on behalf of all appellees, the appellee, Guy F. Atkinson Co., employed a Seattle attorney, Mr. Frank Mechem, to assist in the preparation of the submission (Exhibit 35). The object of this submission was solely *to comply with the Wage Stabilization Act* and secure approval of the actual employment of the working force (R. 262-263, 412).

Early in March, 1944, the representatives of the War Department advised the Guy F. Atkinson Co. to withdraw its submission since the Wage Administration Agency of the War Department would henceforth undertake the solution of the non-manual salary problem (R. 138-139).

Accordingly, the Guy F. Atkinson Co. referred all the data it had assembled on this question to the District Engineer of the War Department (Exhibit 36, R. 139). This information was embodied in Exhibit 42 and submitted to the Wage Administration Agency of the War Department (R. 139-140).

May 4, 1944, the appellees received a letter, Exhibit 43, enclosing the rulings of the War Department on non-manual wage and salary rates, Exhibit 16, over the signature of Dr. John R. Abersold, Chief of the War Department Wage Administration Agency (R. 144). This document and its appendices are referred to in the record as "the Abersold directive."

The first enclosure attached to and made a part of the Abersold directive is denominated "Statement of Policy Governing Cost-Plus-A-Fixed-Fee Contractors' Non-Manual Employees Working in Alaska." The second enclosure is the new salary schedule, and the third consists of job descriptions (Exhibit 16). Paragraph 6 of the first enclosure quotes verbatim and *without change* the language of the *Prime Contract* with reference to payment of overtime to Group "B" non-manual employees. *There is nothing in the Abersold directive which relates to the payment of overtime under the Fair Labor Standards Act* (R. 364, 419, 452, Exhibit 16).

The provision concerning overtime to Group "B" employees was copied from Circular Letter 2236 (Exhibit 14) as embodied in the Prime Contract (Exhibit 13, R. 391).

Upon receipt of the Abersold Directive (Exhibit 16) the salary ranges therein allowed were established by the appellees (R. 145, 468).

May 14, 1944, subsequent to all the foregoing events, the appellant, Sessing, was hired and on May 21, 1944, the appellant Kohl, was hired. Both appellants were employed under written contracts embodying the overtime provisions specified in the Prime Contract (Plaintiffs' Exhibit 6, R. Kohl 5-23, Sessing 5-21, appeals numbered 11464 and 11465).

On September 19, 1944, the Wage and Hour Division definitely notified the defendants by transmitting the letter which is designated in this case as Exhibit 73, that they were violating the Fair Labor Standards Act. The body of this letter reads as follows:

> "Inasmuch as certain violations of the Fair Labor Standards Act have been disclosed in a recent inspection of your operations, it becomes necessary to ask you to compute overtime due certain employees.
>
> "Violations occurred throughout your office employees and non-manual employees groups, both in Seattle and on the Alaska project. These people were paid a straight time wage only, and additional half-time is due them for all hours over forty in any work week. Sample computations and methods for arriving at the amounts due were left with you by our Mr. Cecil, Inspector on

the case. The computations should include both present and past employees for the period upon which work was being done under Contract W46-108-eng-202. These computations should be in our hands as soon as possible to enable us to clear up this matter without undue delay.

"We shall, therefore, expect the computations to reach us before September 27, 1944, after which the case will be further processed."

These appellants were still in the employ of the appellees when this notification was received, but no change was made in defendants' practice with respect to overtime.

The appellants left the jobsite at the end of the week commencing February 10, 1945.

During the entire course of the appellants' employment, they were paid in strict accordance with the terms of the Prime Contract (Exhibit 13) (R. 183, 185, 273-275, 241-242, 468-469). The appellees' witness Northcutt testified:

"Q. I had hoped to avoid having to turn to the contract. I am speaking now about prime contract, Exhibit 13, [428] Article 8, subdivision d, Appendix E. There is nothing in any of the exhibits that you described yesterday or today or during your testimony on the stand that resulted in your deviating from the provisions of the contract as I have just identified it, paragraph d, with respect to working any reasonable number of hours during the first six months [days] worked in a regularly established work week without payment other than the base compensation?

A. I think that is correct." (R. 366)

An examination of the documentary exhibits will disclose that all of the so-called "directives" received by these appellees from the War Department are addressed either to one appellee specifically, or to all CPFF *contractors.*

After the receipt of Exhibit 21, quoted in Appendix B, the appellees never requested a ruling from either the War Department or the Wage and Hour Division as to whether or not their employees were covered by the Fair Labor Standards Act.

> "Q. (By MR. FLOOD): Mr. Northcutt, you never during the progress of the work on Contract 202 or 7100 requested through the War Department a ruling from a civilian agency on whether or not the Fair Labor Standards Act did or did not apply?
>
> A. We never considered it appropriate or necessary." (R. 283)

Mr. Noble, the Contracting Officer, and Mr. McBride, the business manager of these appellees testified to the same effect (R. 418-419, 427, 475-476). Mr. McBride's testimony was:

> "Q. And you never made any inquiry with respect to whether any of the plaintiffs in this action who are employees of the BMK Company, were or were not covered by the Act, did you?
>
> * * * * *
>
> Q. (By Mr. Flood—Continuing): During the course of their employment from January, '44, to February, '45. A. Not that I recall." (R. 475-476)

It will be recalled that the Procurement Regulations (Exhibit 81) in March and Exhibit 75 in April,

1944, advised the appellees that the applicability of the Fair Labor Standards Act to their employees was a matter of dispute between the War Department and the Wage and Hour Division.

Exhibit 75, quoted above in part was the *only* instruction the Contracting Officer ever gave to the appellees concerning the Fair Labor Standards Act. Mr. Noble, the Contracting Officer testified:

> "(Question (By MR. DEGARMO): Mr. Noble, either prior to the Abersold submission or subsequent thereto, did you make any statement as Contracting Officer to the contractors with reference to the applicability of the Fair Labor Standards Act to the work in which they were employed—
>
> 'Answer: No.')
>
> A. No.
>
> Q. You do not wish to adhere to that answer?
>
> A. No.
>
> Q. Will you state, first whether any instructions by you to the contractors to which you may refer were either oral or in writing?
>
> A. Any instructions?
>
> Q. 'Any statements' perhaps I should say, rather than instructions.
>
> A. Well, in writing this Exhibit 75. [465]
>
> Q. Were there any oral?
>
> A. No, none that I know of." (R. 395)

The appellees went to a great deal of trouble to obtain adjustments in base pay so as to secure a qualified non-manual force (R. 290-291, 416-417) and they were punctillious in complying with the terms of Executive Order 9250, because failure to so comply

would have resulted in a withholding of reimbursement (R. 239, 417-418).

Compliance or non-compliance with the Fair Labor Standards Act made no financial difference to the appellees except in so far as the War Department might withhold current reimbursement for costs (R. 218-219).

As long as the appellees complied with the terms of their Prime Contract, they were assured of current reimbursement (R. 268-271).

Had the appellees paid overtime as provided in the Fair Labor Standards Act, without first obtaining a ruling through the War Department from the Wage and Hour Division, they would not have been currently reimbursed (R. 331, 442-446, 477-478, Exhibit 13).

They were assured by the procurement regulations (Exhibit 81) that any amounts they paid in settlement of claims under the Fair Labor Standards Act or in satisfaction of judgments for such claims would be fully reimbursed, and the appellees have, at all times, anticipated reimbursement for judgments that might be paid as a result of this litigation (R. 271). Mr. McBride testified:

> "Q. Did you request the advice of the Contracting Officer as to whether or not a judgment for overtime compensation [591] under the Fair Labor Standards Act would be reimbursible by the United States Government?
>
> A. Not that I recall. We assumed it would be, under the terms of our contract." (R. 475)

The appellees contend that their payment of wages in accordance with Circular Letter 2236 (Exhibit 14), the Prime Contract (Exhibit 13), and the Abersold Directive (Exhibit 16) proves that their failure to pay overtime to these appellants was in good faith in conformity with and in reliance upon administrative regulations, orders, rulings, approvals, and interpretations of an agency of the United States, and hence they have proven a defense under §9 of the Portal-to-Portal Pay Act, of 1947 (Title 29 U.S.C.A., §258).

The appellees further contend that their compliance with all directions of the War Department with reference to payment of wages and preparation of payrolls demonstrated that their failure to pay overtime to these appellants was in good faith and that the total evidence introduced at the trial shows that they had reasonable grounds for believing that their failure to pay overtime to these appellants was not a violation of the Fair Labor Standards Act, hence they have proven a defense to the imposition of liquidated damages under §11 of the Portal-to-Portal Pay Act of 1947 (Title 29 U.S.C.A., §260).

The appellants contend that none of the documents on which appellees purport to have relied or with which they complied constitutes an administrative regulation, order, ruling, approval, or interpretation of an agency of the United States; that the failure of the appellees to pay overtime to these appellants as provided by the Fair Labor Standards Act was not in good faith in conformity with or reliance upon any such regulation, ruling, order, etc., and that on the

contrary, the evidence affirmatively shows that the failure of the appellees to pay overtime to these appellants in accordance with the Fair Labor Standards Act was not in good faith and that the appellees did not have reasonable grounds for believing that their failure to pay overtime to these appellants was not a violation of the Fair Labor Standards Act. Hence the appellants contend the appellees have not proven a defense under either §§9 or 11 of the Portal-to-Portal Pay Act of 1947 (Title 29 U.S.C.A., §§258, 260).

SPECIFICATIONS OF ERROR

1. The trial court erred in entering Finding of Fact No. I, reading as follows:

> "All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administration Agency." (R. 18)

The above-quoted Finding of Fact No. 1 is erroneous for the reason that the documents with which the appellees conformed and upon which they assert they relied do not constitute administrative regulations, orders, rulings, approvals or interpretations of any agency of the United States, and for the further reason that the record affirmatively shows that the

payment of wages in conformity with and in purported reliance upon the documents in evidence was not in good faith.

2. The trial court erred in entering Finding of Fact No. II, which reads as follows:

> "All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as Amended." (R. 18)

The above-quoted Finding of Fact is erroneous for the reason that the record affirmatively shows that the practices of the appellees with respect to the payment of overtime compensation to the appellants were not in good faith and that the appellees had no reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act.

3. The trial court erred in entering Conclusion of Law No. I, which reads as follows:

> "That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional." (R. 19)

The foregoing Conclusion of Law is erroneous for the reason that, as applied to these appellants, Sections 9 and 11 of the Portal-to-Portal Act of 1947 (Title 29, U.S.C.A., §§258-260) deprive these appellants of their rights under the Fifth Amendment to the Constitution of the United States.

4. The trial court erred in entering Conclusion of Law No. II, which reads as follows:

> "That defendants are subject to no liability to the plaintiff for, or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended." (R. 19)

The above-quoted Conclusion of Law is erroneous for the reason that the appellees failed to establish by competent proof the allegations of their supplemental answers and affirmative defenses, and for the further reason that the statute upon which said supplemental answers and affirmative defenses purport to be based, namely Sections 9 and 11 of the Portal-to-Portal Act of 1947 (Title 29, U.S.C.A., §§258 and 260) are unconstitutional since they conflict with the Fifth Amendment of the Constitution of the United States (R. 19).

5. The trial court erred in entering the Conclusion of Law No. III vacating its Findings of Fact, Conclusions of Law and Judgment heretofore entered on the 28th day of May, 1946, for the reasons hereinbefore and hereafter set out (R. 19).

6. The trial court erred in entering Conclusion of Law No. IV to the effect that the action of these appellants should be dismissed with prejudice, said Conclusion of Law being erroneous for the reasons hereinbefore and hereinafter set forth (R. 19).

7. The trial court erred in entering its supplemental judgment in favor of the defendants (R. 20 to 21).

ARGUMENT

I.

SECTION 9 OF THE PORTAL-TO-PORTAL PAY ACT OF 1947 (TITLE 29, U.S.C.A. §258).

§9 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A., §258) reads as follows:

> "§258 Reliance on past administrative rulings, etc.
>
> "In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, *if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.* Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." (Emphasis supplied)

In these cases the act or omission complained of is the failure of the appellees to pay overtime to the appellants in accordance with the following section of the Fair Labor Standards Act (Title 29, U.S.C.A., §207 (a) (3))

"§207 Maximum hours.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * * *

"(3) for a work-week longer than forty hours after the expiration of the second year from such date,

"unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

In order to be relieved of liability for the failure to pay overtime as required in the above-quoted section of the Fair Labor Standards Act, an employer must plead and prove the following: That the failure to pay overtime, as provided in the above-quoted section of the Fair Labor Standards Act was (1) in good faith in conformity with and in reliance on (2) any administrative regulation, order, ruling, approval or interpretation (3) of any agency of the United States (4) or any administrative practice or enforcement policy of any such agency (5) with respect to the class of employers to which the appellees belonged. Finding of Fact No. I (R. 18) eliminates from our consideration reliance upon or action in conformity with any administrative practice or enforcement policy and limits our inquiry to whether or not the appellees have proved that their failure to pay overtime to the appellants was in good faith, in conformity with, and in reliance on an administrative regulation, order, ruling, approval or interpretation of an agency of the United States.

II.

THE APPELLEES HAVE PROVED NOTHING BEYOND COMPLIANCE WITH AND RELIANCE UPON A CONTRACT.

A. Compliance with and reliance upon a contract does not establish a defense.

Section 9 of the Portal-to-Portal Act of 1947 (Title 29, U.S.C.A., §258) provides that a defendant may be relieved of liability for failure to pay overtime compensation under the Fair Labor Standards Act if he pleads and proves that his action was in good faith and conformity with and in reliance on any administerative regulation, order, ruling, approval or interpretation of any agency of the United States. Thus §9 creates an immunity under certain conditions for acts which would normally be within the ambit of the Fair Labor Standards Act.

In Broom's Legal Maxims, page 663, we read:

> "A statute, it has been said, is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to the interpretation of a statute, that *expressio unius est exclusio alterius.* * * *"

and again at page 666:

> "Lastly, where a general Act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions."

These rules were adopted and applied by the Supreme Court of Virginia in *Whitehead v. Cape Henry Syndicate, et al.*, 105 Va. 436, 54 S. E. 306, 308. In other words, it is the intention of Congress as expressed in the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A., §258) to relieve from liability under the Fair Labor Standards Act where the employer can plead and prove that he, in good faith, acted in conformity with and relied upon the enumerated types of directions and only those. Had it been the intention of Congress to grant relief from the operation of the Fair Labor Standards Act where employers in good faith conformed to and relied upon a contract with an agency of the United States, the Congress would have so stated.

B. None of the documents on which defendants allege they relied constitutes an administrative regulation, order, ruling, approval, or interpretation of an agency of the United States.

> "The terms 'administrative, regulation, order, ruling, approval, or interpretation' in the above statute imply a command or direction authoritatively given for a general course of action, applying to all alike. *Carolina Aluminum Co. v. Federal Power Commission*, 4 Cir., 97 F.(2d) 435, 436; *Osborne v. Johnston*, 9 Cir., 120 F.(2d) 947; *Christopher v. Mayor etc. of City of New York*, 13 Babr., 567, 573; 53 C.J., p. 1178)." *Semeria v. Gatto*, 75 N.Y.S.(2d) 140, 143.

The general statement as to the effect of the Portal-to-Portal Act of 1947 issued November 18, 1947, by the Administrator of the Wage and Hour Division,

(12 F. R. 7655), analyzes the foregoing terms with particularity. The attention of the court is respectfully directed to Sections 790.17 and 790.18 of this statement.

The weight to be accorded the Administrator's opinions is described thus in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. ed. 124:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (p. 140).

The terms "regulation" and "order" are interpreted by the Administrator to connote the authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review. Clearly, not one of the documents with which appellees claim they acted in conformity or upon which they claim that they relied falls into those catagories. From the prime contract (Exhibit 13) down to the last letter, there is not one rule which purports to have the binding effect of law. The provisions of the prime contract with respect to labor and the uniform employment contract attached thereto as Appendix "E" merely state the terms under

which a specific construction contract is let, and in no respect purport to establish legal rules of general application. In violating the terms of these documents the appellees could have incurred no legal sanctions whatever, but such a violation would have been merely a breach of contract resulting in the refusal of the War Department, as a contracting party, to reimburse the refractory appellee for his current costs.

The term "interpretation" is construed as being a statement by an agency which indicates its present belief concerning the meaning of applicable statutory language. Not one of the documents offered by the appellees even purports to construe the meaning of the language of the Fair Labor Standards Act or its applicability to these appellants, and the Contracting Officer expressly disclaimed any intention to do so (R. 452).

The term "ruling" embraces letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries. While the documentary evidence offered tends to show that the appellees inquired concerning the applicability of the Fair Labor Standards Act, the evidence is conclusive of the fact that they never received an answer to their inquiries or any opinion at all except that the War Department did not know (Exhibit 75).

"Approval" appears to be a term of art connoting the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority. In this case we find no affirmative grants of permission to operate outside the scope of the Fair Labor Standards Act, or approval of any

course of conduct as being proper under any statute, but rather approval of a certain course of conduct *solely* as being in compliance with the terms of a contract. This point is illustrated throughout the evidence by the fact that whenever the agents of the War Department did not "approve" an act of a defendant, reimbursement was withheld, but no legal sanction was ever threatened or imposed. Moreover, the War Department at no time possessed or claimed to possess the statutory authority to approve any wage and hour arrangement, but, on the contrary, offered to assist the appellees in obtaining approval from the civilian agencies authorized to grant such (Exhibit 21).

The foregoing interpretations of the administrator are strongly fortified by the opinion of the District Court for the Northern District of Illinois, Eastern Division, filed September 23, 1948, in the case of *Bauler v. Pressed Steel Car Co.*, 15 Labor Cases, Para. 64,751, where that court said:

> "* * * On the same principle, I think that an employer, to come within the protection of an administrative approval or interpretation, must have followed the familiar routine of submitting a particular problem to the head of the agency for a ruling or opinion. An opinion letter of the head of the agency or his counsel, ruling on the question, interpreting the section of the statute in question in the light of the facts of the employer's situation or approving the employer's interpretation of the law, would come within the meaning of this section. I think nothing less will do. * * *"

It will be observed from an examination of the documentary evidence in these cases that the communications of the War Department introduced by these appellees in support of their defense under §9 are either addressed to one appellee or to all CPFF contractors. There is not one document with which the appellees contend that they conformed or upon which they contend that they relied which purports to control or direct the conduct of anyone except a contracting party. The testimony conclusively demonstrates that the conduct of the appellees in failing to pay overtime in accordance with the Fair Labor Standards Act was dictated solely by the effort and desire of the appellees to comply with the terms of the prime contract.

C. The War Department as a Contracting Party is not an administrative agency.

The United States, as a contracting party, does not act as an administrative agency in administering or interpreting the laws of the nation, but acts solely as a contracting party the same as if it were a private individual.

United States v. Bank of the Metropolis, 15 Pet. 377, 10 L. ed. 774;

The Floyd Acceptances, 7 Wall. 666, 19 L. ed. 169;

Garrison v. United States, 7 Wall. 688, 19 L. ed. 277;

Cooke v. United States, 91 U.S. 389, 23 L. ed. 237;

United States v. Spearin, 248 U.S. 132, 63 L. ed. 166, 39 S. Ct. 59;

United States v. National Exchange Bank, 270 U.S. 527, 70 L. ed. 717, 46 S. Ct. 388; *Lynch v. United States*, 292 U.S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

In the case of *United States v. National Exchange Bank*, 270 U.S. 527, 70 L. ed. 717, 46 S. Ct. 308, *supra*, Mr. Justice Holmes delivered the opinion of the court and observed at page 34:

> "The United States does business on business terms."

and in 1933 Mr. Justice Brandeis, speaking for the court in *Lynch v. United States*, 292 U.S. 571, 78 L. ed. 1434, 54 S. Ct. 840, *supra*, said at page 579:

> "When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

It is thus clear that Congress in enacting Section 9 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §258) did not intend to alter the law as laid down by the foregoing cases and did not intend to relieve anyone of liability for violating any law of the United States by virtue of a contract with the United States or any of its agencies, but intended solely to grant relief from liability where an employer in good faith acted in conformity with or in reliance upon some administrative regulation, order, ruling, or interpretation purporting to have the force of law. The Administrator of Wage and Hour Division in the bulletin to which we have referred above adopts this interpretation.

In a case similar on its facts to the instant case,

namely *Jackson v. Northwest Airlines* (D.C. Minn. 3D) 76 F. Supp. 121, the District Court held:

> "Defendant entered into a contract with the United States to modify bombers. That contract was executed for the Government by a contracting officer of the Army Air Corps. Thus, in that transaction, the Army Air Corps was not acting as an administrative agency. It was acting as part of the executive branch of the Government and in an executive, not in an administrative agency capacity. The signature of the Air Corps contracting officers created an obligation of the United States. It acted as a contracting party, not an administrative agency." (p. 129)

D. No document or instruction subsequent in time to the Prime Contract affected the policies of the appellees with respect to the payment of overtime to the appellants.

A vast mass of documentary evidence was introduced at the trial of these cases for the purpose of showing that the appellees complied scrupulously with every instruction and request of the War Department in the performance of their contracts. Some of these exhibits comprise organization charts, overtime payments to manual employees (both of these appellants were non-manual employees), activities of the appellees at La Porte, Indiana (all operations material to these cases took place in the Aleutian Islands), methods of preparing payrolls and base salary schedules, computation of travel time and holiday pay. No document or oral instruction ever caused the appellees to deviate one iota from the terms of the prime contract

(Exhibit 13) in their policies concerning overtime payment. Their failure to make overtime payments in accordance with the Fair Labor Standards Act is the only act or omission complained of in these cases. That none of these documents had any effect upon the conduct of the appellees with reference to the act or omission complained of is fully borne out by the testimony (R. 273-275, 366, 421-422).

E. The War Department never purported to interpret the Fair Labor Standards Act.

In Exhibit 21 quoted above the War Department specifically advised the appellees that the Fair Labor Standards Act was administered by the Wage and Hour Division of the Department of Labor and further advised the appellees that all problems concerning the applicability of the Fair Labor Standards Act to a contractor's operations should be submitted to the War Department which would in turn obtain a ruling from the appropriate civilian agency. The procurement regulation set forth in Exhibit 81 specifically advised all CPFF contractors that the applicability of the Fair Labor Standards Act to their operations was a matter of dispute between the War Department and the agency charged with the enforcement of the Fair Labor Standards Act, namely the Wage and Hour Division. In Exhibit 75 the War Department made a further disclaimer of any knowledge as to whether or not the Fair Labor Standards Act applied to the appellees' operations. Moreover, the Contracting Officer in charge of these contracts

specifically disclaimed any authority in himself or in the War Department to pass upon the question of whether or not the Fair Labor Standards Act covered or applied to the projects undertaken by these appellees (R. 452).

The type of situation to which §9 of the Portal-to-Portal Pay Act of 1947 was intended to apply is well illustrated by the case of *Rogers Cartage Co. v. Reynolds* (C.C.A.-6, 1948) 166 F.(2d) 317. In that case, in affording relief to an employer under §§ 9 and 11, the Circuit Court said:

> "* * * It was pleaded and proved here that the appellant relied on the fact that it was subject to the jurisdiction of the Interstate Commerce Commission and that its omission to comply with §207 of the Fair Labor Standards Act was in reliance upon the regulations, orders and rulings of the Interstate Commerce Commission. It also appears that the payments of wages were made in the amounts required by a directive of the National War Labor Board, and the appellant relied upon this fact. Both the Interstate Commerce Commission and the National War Labor Board are agencies of the United States." (p. 320)

The Interstate Commerce Commission and the War Labor Board are good examples of agencies of the United States issuing regulations, orders, rulings and interpretations having the force of law as opposed to an agency merely requiring performance of its contract with a private contractor and disclaiming all responsibility for the interpretation of law.

III.

WITH REFERENCE TO THE ACT OR OMISSION COMPLAINED OF THE APPELLEES DID NOT ACT IN GOOD FAITH.

By the vast mass of documentary evidence concerning matters other than the payment of overtime the appellees attempted to show a course of conduct embodying action in conformity with and reliance upon all War Department requirements in good faith. Proof concerning any act or omission except the acts or omissions complained of is immaterial and irrelevant to the only issue permissible under §9 for the following reasons:

1. The appellants complain of an act or omission which has been held a violation of a specific statute. The other acts and omissions concerning which appellees have offered proof may have been in perfect conformity with then existing law. Thus the question of good faith in acting in conformity with and in reliance upon legal requirements and requests can have no logical bearing on the question of good faith in relying upon or acting in conformity with illegal requirements. The question of good faith simply is not present with respect to the legal and proper acts of the appellees. It can only arise with reference to acts found to be illegal. The appellees have asked the court to find that because they relied upon legal requirements under their contract they acted in good faith in relying upon requirments found to be illegal. Clearly no such inference can legitimately be drawn and evidence of the conduct of appellees with respect to legal demands is not probative on the issue of good

faith with respect to illegal demands of a contracting party.

Good faith cannot be involved at all in reliance uopn a legal demand or requirement, but is involved solely where the reliance is upon illegal requirements.

That the good faith of an employer must be with reference to the act or omission complained of is well illustrated by the case of *Kerew v. Emerson Radio & Phonograph Corp.* (D.C.S.D. N.W. June 16, 1947) 13 Labor Cases Para. 63,908. In that case the District Court for the Southern District of New York said:

> "* * * As I stated during the argument of counsel, the proof in respect to that special defense was rather thin. No conference was had with the Administrator of the Wage and Hour Division until some time in March or April of 1944, and that conference apparently was the result of certain complaints that had been made by employees that they were not being paid as they should have been paid under the Fair Labor Standards Act. *The plaintiff and the plaintiff's job were not discussed at that conference.* So this second special defense of the defendants, based upon the good faith excuse, is dismissed." (p. 71,469) (Emphasis supplied)

2. It is of interest to note that the only report ever submitted by the appellees to the War Department or any other agency concerning the activities of these appellants is embraced in the job descriptions attached to Exhibit 42, the submission made for compliance with the Wage Stabilization Act (R. 260-261, 424). This report was made prior to the employment of either of these appellants (R. 266). The inadequacy

of these descriptions to determine compliance or conformity with, or applicability of, any federal statute is immediately apparent from a reading of the job descriptions covering these appellants, time keepers and payroll clerks, with the evidence of their actual activities as shown in the record in cases Nos. 11464 and 11465. The reason for this utter inadequacy is apparent from the fact that *these job descriptions were not submitted at all for the purpose of determining the applicability of the Fair Labor Standards Act* or any other act to the operations of these appellees, but solely for the purpose of compliance with the Wage Stabilization Act and to secure approval of the War Department for the employment of the particular men (R. 262-263).

That any approval of the War Department of the failure of the appellees to pay overtime to the appellants based on such sketchy information affords the appellees no relief under §9 of the Portal-to-Portal Pay Act of 1947 is demonstrated by the case of *Reid v. Day & Zimmerman* (D.C. S.D. Iowa, Ottumwa Division) 73 F. Supp. 892, where the court said at page 895:

> "Notwithstanding that the officers of the Ordnance Department may have approved the classification of this plaintiff as a storekeeper and exempt as such, still there is nothing to indicate that the officers of the Ordnance Department at any time knew the facts, as now stipulated, with reference to his work and also that his suggestions or recommendations as to hiring and firing were not given particular weight by the defend-

ant during the period here under examination, and approved such actions or omissions.

"I am satisfied the evidence does not establish that defendant is relieved of liability by virtue of the provisions of Section 9 of the Portal-to-Portal Act." (p. 895)

3. In the interpretative bulletin issued by the Administrator of the Wages and Hours Division quoted above, 12 F.R. 7655, at §790.15, the Administrator defines good faith as follows:

"* * * 'Good faith' requires that the employer have honesty of intention *and no knowledge of circumstances which ought to put him upon inquiry.*" (Emphasis supplied)

Since few cases have been decided to date in which the meaning of the term "good faith" has been discussed, it seems proper to refer to the Congressional debates for guidance on the meaning of this term.

Mr. Walter, a member of the House, stated in answer to a question from the floor:

"I think I should add to what I said about the defense of good faith. The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by governmental agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. * * *" (Congressional Record May 1, 1947, p. 4515)

Mr. MacKinnon, speaking on the same day stated:

"Mr. Speaker, as a member of the Labor Com-

mittee I have been interested in the good faith section of this portal-to-portal bill. In several cases which were discussed on the floor of the House it appears that there were conflicting rulings as to employers' obligations.

"Is an employer in good faith when knowing of two conflicting rulings he claims to have relied on one of them? The answer must be that having notice of conflict, he cannot be said to have relied in good faith when he picks one of the rulings on which to rely and, particularly, it seems to me, under the language of the bill, when he relies on the ruling that is most favorable to his, the employer's interest.

"Can an employer avail himself of the good-faith defense when knowing of two conflicting rulings, he has secured indemnification against the probability that the courts will hold invalid the ruling in accordance with which he is acting?

"Under these circumstances, reliance in good faith does not exist, and the good-faith defense is not intended to be made available in such situation.

"When there are conflicting rules and interpretations by different Government officials, that is exactly the type of case which must be settled in the courts, and Congress should not and does not intend under this bill to attempt to interfere with final court decision on such questions." (Congressional Record, May 1, 1947, p. 4516)

Mr. Keating, commenting upon the same point, stated:

"* * * As a member of the subcommittee which drafted the original bill, I do not believe that such defense is intended to apply where an em-

ployer had notice of conflicting rulings, but only where he innocently in good faith followed and relied upon a ruling believing it to be valid.

"These cases were discussed when the bill was up for consideration on the floor in February where an employer working for the Government on cost-plus war contracts secured indemnification from the Government against the possibility that a ruling would be declared invalid by the courts. In such cases, under the language of the bill, I am sure there could be no good-faith defense. * * *." (Congressional Record, May 1, 1947, p. 4517)

As has been shown above, the appellees at all times had both actual and constructive knowledge of the fact that the applicability of the Fair Labor Standards Act to their projects was a matter of dispute between their contracting party, the War Department, and the agency charged with the enforcement of the Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor. The appellees never made any effort to resolve this problem.

IV.

THE DEFENDANTS WERE SOLELY CONCERNED WITH REIMBURSIBILITY, NOT WITH COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT.

When in the course of the appellees' operations a serious question arose with reference to the compliance of the appellees with the Wage Stabilization Act, they were diligent in securing a ruling which would assure their compliance with this Act. As has been shown

above in our statement of the case, the reason for this diligence was that without increasing their base pay to non-manual employees the appellees could not secure an adequate working force of such employees and that in order to be reimbursed for the current cost in the payment of such increases the approval of an agency charged with the enforcement of the Wage Stabilization Act was essential (Exhibit 25, R. 238-239, 240-241, 418).

On the other hand, in so far as the applicability of the Fair Labor Standards Act was concerned, the appellees had no reason to interest themselves at all. If the appellees had paid overtime as required by the Fair Labor Standards Act without first obtaining a ruling authorizing them to do so they would not have been currently reimbursed for their costs (R. 331, 477-478).

On the other hand, if the appellees completely ignored the problem of the applicability of the Fair Labor Standards Act to their employees and subsequently were found to have violated that act and judgments were entered against them for such violations they were assured of being fully reimbursed for the amounts paid either in settlement of such claims or in satisfaction of such judgments (Exhibit 81, R. 271, 475).

Thus the record affirmatively shows that the appellees had no reason to concern themselves in any way with the applicability of the Fair Labor Standards Act and that they did not do so.

V.

THE APPELLEES ARE NOT ENTITLED TO RELIEF FROM LIQUIDATED DAMAGES UNDER §11 OF THE PORTAL-TO-PORTAL PAY ACT OF 1947.

Section 11 of the Portal-to-Portal Pay Act of 1947 (Title 29 U.S.C.A. §260) reads as follows:

> "§260. Liquidated damages
>
> "In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (d) of this title."

As has been shown above the War Department at all times advised the appellees that there was a serious question as to whether or not the Fair Labor Standards Act applied to their projects, but it also advised them that if the appellees were subjected to claims under the Fair Labor Standards Act, which claims might be resolved in favor of the claimants, they would be reimbursed for settlements or judgments paid. The appellees stated that their belief that they were not covered by the Fair Labor Standards Act was based upon informal advice from the National Office of the Contractors Association (R. 141-142),

and an informal oral discussion with the appellees' attorney in San Francisco (R. 226-227). Reliance upon trade bulletins with reference to liability under the Fair Labor Standards Act is insufficient to establish a defense to liquidated damages under §11 of the Portal-to-Portal Pay Act of 1947. *Mauro v. Slaughter & Co.* (D.C., S.D., N.Y., Jan. 30, 1948) 14 Labor Cases, Para. 64,299. Neither is the advice of a private attorney sufficient to entitle an employer to relief under §11. *Gustafson v. Wolferman, Inc.*, 73 F. Supp. 186. In this case the court, at page 197, said:

> "The court declares the law to be, that the advice and opinion of an attorney as to the applicability of the provisions of the Fair Labor Standards Act to the business of an employer, or a segment thereof, is not in and of itself sufficient to establish 'good faith' of the employer under Section 11, of the Portal-to-Portal Act of 1947.
>
> "That defendant did not have reasonable grounds for believing that its act in omitting to pay its employees, employed in its candy manufacturing department, minimum wage and overtime compensation was not within Sections 6 and 7, of the Fair Labor Standards Act by any interpretation issued by the Administrator of the Wage and Hour Division of the United States Department of Labor, as expressed in Interpretative Bulletin No. 6.
>
> "Defendant could not accept the advice of an attorney and follow a course of conduct according to its own judgment of the applicability of the provisions of the Fair Labor Standards Act to its business. Defendant is presumed to know the law and whether the provisions of the Fair

Labor Standards Act applied to its business and each segment thereof. The advice of an attorney, that the provisions of the Fair Labor Standards Act do not apply to an employer's business is not 'reasonable grounds for believing that his act or omission' in not complying with the provisions of said Act was not a violation thereof. To hold otherwise would be to eliminate from actions instituted under the Fair Labor Standards Act any possible recovery of liquidated damages, as specified in Section 16 (b) thereof, 29 U.S.C.A., Sec. 216 (b)." (pp. 197, 198)

One of the most careful analyses of the scope of §11 is found in the case of *Reid v. Day & Zimmerman*, 73 F. Supp. 892, *supra*, where the court, at page 895, said:

"But as above stated, defendant claims that at least it comes within the provisions of Sec. 11 of the Portal-to-Portal Act which has to do with liquidated damages. Here again the defendant has sought to show that it is exempt from liability for liquidated damages by reason of its good faith. I am satisfied that this good faith has reference to something different than the good faith of employers in actually believing that an employee was exempt from the provisions of the Act, or came within an exempt classification. It will be noted that the Act (sec. 11) provides that two things must be shown, to wit:

"1st. 'That the act or omission giving rise to such action was in good faith.'

"2nd. 'That he (the employer) had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended.'

"It is necessary for the defendant to plead and prove both of these actions of good faith.

"The act or omission complained of was that the employee was nonexempt and was not an executive within the purview of the definition of what constitutes an executive, in that, he performed these services of the same nature as that performed by employees under him and that his recommendations for hiring and firing were not given any particular weight. Certainly, it being admitted by the stipulation of facts that the employee was not an executive, the defendant must, to establish its defense with reference to the payment of liquidated damages, plead and show that he had reasonable grounds for believing that his acts and omissions in these particulars were not a violation of the Fair Labor Standards Act. The evidence does not so establish."

In the instant case the defendants not only never received any advice that the Fair Labor Standards Act did not apply to their operations, but on the contrary, were advised prior to their employment of these appellants that the matter was a doubtful one, and the War Department had indicated its willingness to reimburse the appellees for losses incurred through violations of the Fair Labor Standards Act.

A belief in good faith that the acts or omissions complained of were not violations of the Act was thus rendered impossible.

VI.

SECTIONS 9 AND 11 OF THE PORTAL-TO-PORTAL ACT ARE UNCONSTITUTIONAL

In the recent cases of *Cingrigarani v. V. H. Hubbert & Son, Inc.*, 17 L.W. 3115, and *Darr v. Mutual Life Insurance Co. of New York*, 17 L.W. 3114, the Supreme Court of the United States denied *certiorari* where the Circuit Courts of Appeals had upheld the constitutionality of Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §§ 251-262). The *Darr* case, *supra*, 17 L.W. 3114, specifically raised the question of the constitutionality of the good faith defenses of Sections 9 and 11 of this Act. The appellants are fully aware that the overwhelming weight of authority in the District Courts and the Circuit Courts of Appeals is that these sections of the Portal-to-Portal Pay Act are constitutional, but, inasmuch as the appellants believe their argument that these sections are unconstitutional to be completely sound, they urge this court to consider their position.

The denial of a Writ of Ceriorari by the United States Supreme Court imports no expression of opinion of that court upon the merits of the question. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 75 L. ed. 1142, 51 S. Ct. 498.

The appellant believes that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 violate the Fifth Amendment of the Constitution of the United States which reads as follows:

> "No person shall * * * be deprived of life, liberty, or property without due process of law; * * *."

The right to overtime compensation under the Fair Labor Standards Act, as well as to liquidated damages, is a vested property right which accrues on the date payment should have been made. *Atlantic Co. v. Broughton*, 146 F.(2d) 480.

The cause of action created by a violation of the Fair Labor Standards Act is a quasi-contractual chose in action, and once having vested, cannot be abrogated by retroactive legislation. *Steamship Co. v. Joliffe*, 2 Wall. 450; *Coombs v. Getz*, 285 U.S. 434, 76 L. ed. 866, 52 S. Ct. 435. The quasi-contractual nature of the liabilities created by the Fair Labor Standards Act were recognized by this court in the case of *Lassiter v. Guy F. Atkinson Co.*, 162 F.(2d) 774. Where a claim for compensation has been created by statute the legislative body which created the claim cannot abrogate or destroy such claim by the subsequent repeal or modification of the statute out of which the claim arose. Sutherland, Statutory Construction (3d ed.) §2044; *Louisville Bank v. Radford*, 295 U.S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106.

CONCLUSION

Even if this court deems Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 to be constitutional, the record is clear that the appellees have not, by the evidenced adduced in the trial of this case, brought themselves within the scope of either of those provisions. On the contrary, the record shows affirmatively that the appellees at all times acted solely in accordance with the terms of their prime contract, Exhibit 13, with the War Department; that the War Depart-

ment in connection with the projects on which these appellees were engaged functioned, not as an administrative agency of the United States, but solely as a contracting party. Moreover, the record is replete with testimony to the effect that the appellees at all times had constructive and actual knowledge that the applicability of the Fair Labor Standards Act to these projects and particularly to these appellants was a matter of serious doubt, and that the administrative agency charged with the enforcement of the Fair Labor Standards Act was of the opinion that the act was applicable to the activities of these appellants. Far from acting in good faith, the record shows affirmatively that the appellees acted solely in such a manner as to assure themselves of weekly reimbursement from the War Department in accordance with their prime contract and were at all times confident that they would be reimbursed for any amounts they might have to pay in settlement of claims or satisfaction of judgments against them for violation of the Fair Labor Standards Act.

For these reasons, the appellees have completely failed to bring themselves within the protection of Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947, and the trial court erred in entering judgment on behalf of the appellees.

The judgment of the trial court should be reversed.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX A

The pertinent provisions of Circular Letter 2236 are as follows:

"1. The following requirements as to the hours of work, overtime allowances, and provisions for leave accrual for all non-manual employees of cost-plus-a-fixed-fee principal and subcontractors in connection with construction projects will be included *in all future negotiations for such contracts* * * *

2. Attention is invited to the fact that subparagraphs *a* to *l*, inclusive, of paragraph 5, below, have been prescribed as contract provisions by Headquarters, Services of Supply, as indicated in Procurement Regulations, and no material deviation therefrom can be made without the approval of that Headquarters. * * *

4. The policies set forth in subparagraphs *a* to *r*, inclusive, of paragraph 5, below, shall be applicable to all cost-plus-a-fixed-fee principal and subcontracts hereafter placed in connection with construction activities.

5. Requirements as to hours of work, overtime and leave alowance for non-manual employees of cost-plus-a-fixed-fee principal and subcontractors:

* * * * *

b. For this purpose, non-manual employees will be classified in the folowing groups:

* * * * *

(2) Group "B". Employees whose base salaries are between $50.00 and $90.00 per week, inclusive, except those included in Groups "D" and "E."

* * * * *

c. The base salaries of *all* employees of Groups "A," "B" and "C" will be established on the basis of a minimum work week of 48 hours.

* * * * *

e. Group "B" employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day." (Emphasis supplied)

APPENDIX B

(Exhibit 21)

Letter dated June 28, 1943, from War Department per Major Templeton to Guy F. Atkinson Co.

"Gentlemen:

"The following instructions have been received from the office of the Adjutant General, Washington, D. C., by Memorandum No. S5-101-43, dated 4 June 1943, and are quoted for your information and future guidance: '1.a. Problems frequently arise under cost-plus-fixed-fee contracts as to the applicability or interpretation of laws or Executive Orders affecting the labor costs of the contractor.

'b. Such problems have in the main been submitted for determination through the Contracting Officer in the case of private plants operating under cost-plus contracts or through the Commanding Officer of Government-owned, privately-operated plants. However, some contractors have submitted such problems direct to civilian agencies without clearance through the War Department.

'c. Since the War Department is rosponsible for the reimbursement of proper labor costs under these contracts, all such problems will be submitted through the Contracting or Commanding Officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250, and 9301; Fair Labor Standards Act; Walsh-Healey Act; Davis-Bacon Act; Copeland Act; 8-Hour Law; and other laws or orders, past or future, affecting labor costs.

'2.a. If a ruling is required from a civilian

agency it will be obtained by or through the War Department.

'b. Applications for approval of wage or salary adjustments or other rulings under Executive Order No. 9250 by contractors not included within the delegation of authority from the War Labor Board to the War Department Wage Administration Agency will be submitted to the War Labor Board or to the Bureau of Internal Revenue through the Contracting Officer. The same procedure will be followed with respect to application to the War Man Power Commission for interpretations under Executive Order No. 9301. [286]

'c. With respect to all other laws and orders, necessary rulings of civilian agencies will be obtained by the War Department. Requests for such rulings are to be made through the Contracting or Commanding Officer.

'3. This procedure is intended to expedite determinations when the War Department has issued governing rulings. In addition, since the War Department must pass upon the labor costs for reimbursement, unnecessary duplication of clearance is avoided'."